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Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 145

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOHN MILLER,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOHN MILLER,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, John Miller prays that a Writ of Certiorari issue to review the judgment of conviction of the defendant by the Criminal Court of the City of New York, County of New York convicting the defendant of the violation of Section 887 (7) of the Penal Code of the State of New York, and sentencing to 2 days in the workhouse, sentence suspended, and from an affirmation of the said conviction by the Appellate Term of the Supreme Court of the State of New York entered on December 17, 1964 and from a denial by an Associate Justice of the Court of Appeals of the State of New York, HON. STANLEY H. FULD, on an application made for a review of the conviction, such denial being dated and entered the 16th day of February, 1965. The application for a review by the Court of Appeals of such conviction urged the invalidity of Section 887, subdivision

7, of the Code of Criminal Procedure on the ground that it violates the due process and equal protection clauses of the 14th Amendment of the Federal Constitution.

Judgment of conviction by the Criminal Court of the State of New York, County of New York, and its affirmance by the Appellate Term of the Supreme Court of the State of New York, First Department, is unreported. The Certificate denying leave by the Court of Appeals of the State of New York is not yet reported but is set forth herein at length in Appendix A hereof.

Jurisdiction

The judgment of affirmance by the Appellate Term of the Supreme Court of the State of New York, First Department, was entered on March 31, 1964 and the Certificate denying leave by the Court of Appeals of the State of New York was entered on the 16th day of February, 1965. Jurisdiction of this Court is invoked upon the basis that Section 887, subdivision 7 of the Code of Criminal Procedure of the State of New York violates the due process and equal protection clauses of the 14th Amendment of the Federal Constitution.

Questions Presented

The basic aspect of the guaranty of due process of law is that criminal laws should be applied fairly, impartially and scrupulously. Should a law be stretched to procure a conviction by a representative of an unpopular position or way of living; should an individual be punished and hence branded of having committed a crime when he has not violated any applicable law? Defendant believes he is a victim of an unfair, unjust and insupportable interpretation of Section 887, subdivision 7 of the Code of Criminal Procedure.

Constitutional Section Involved

The statutory provision involved is the 14th Amendment of the Constitution of the United States, the pertinent portions of such section being as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Statement

Defendant, a male person, was arrested on March 24, 1964 at about 2:30 P.M. while walking in the vicinity of 91st Street and West End Avenue in the City, County and State of New York. Viewing the evidence as presented by the prosecution, it is charged that at the time of the arrest of the defendant, he was dressed in female attire and was wearing lip rouge and face make up (R-4). His appearance gave the viewer or casual passer-by the impression that he was an elderly woman (R-5). During the period that the arresting officer had the defendant under observation—some 3 to 5 minutes—(R-6), the defendant did not speak to anyone on the street (R-6).

The defendant was arrested and charged with having violated Section 887, subdivision 7, of the New York Code of Criminal Procedure, i.e., vagrancy. The defendant pleaded not guilty.

Trial was held in Part 1-C of the New York Criminal Court before Hon. Edward D. Ciazzo. After the presentation of the People's evidence, the defendant rested and moved for acquittal. This motion was denied, the Trial

Judge indicating that in his view, the People's proof warranted conviction because "the conduct of the defendant fits the language of that section, that subdivision, (R-12-13).

The Federal Question Involved

The question of equal protection of the laws was raised in the following manner.

Defendant's counsel at the conclusion of the People's case moved to dismiss on the ground that Section 887-7 of the Code of Criminal Procedure is unconstitutional in that it violates the 14th Amendment to the Constitution of the United States (R-13).

Reasons for Granting the Writ

1. It is axiomatic that penal statutes other than those specifically contained in the Penal Law of the State of New York and consequently governed by Section 21 thereof, are to be strictly construed in favor of a defendant charged thereunder, Matter of *Citron v. Belcastro*, 196 Misc. 272, 275, and cases cited. Similarly, in construing and applying such a penal statute, it is incumbent upon the court to carry out the legislature intent and not to expand the meaning and intendment of this section under a guise of judicial interpretation. *People* v. *Dioguardi*, 8 A. D. 2d 426, 434 (Reversed on other grounds, 8 N. Y. 2d 260); *People* v. *Wood*, 8 N. Y. 2d, 48, 51. *People* v. *Johnaken*, 196 Misc. 1059 at 1061.

While subdivision 7 of Section 887 of the Code of Criminal Procedure might appear, at first reading, to be plain and unequivocal on its face, the section by itself does not describe any act that is criminal nor does the section by itself proscribe any conduct. The section reads as follows:

Who are vagrants. The following persons are vagrants: . . .(7) a person, who, having his face painted, discolored,

covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure.

A mere wearing of a disguise is not in and of itself a danger to the safety, health and welfare of society and cannot be prohibited by police power. To prohibit conduct which is not a danger to the public welfare is arbitrary, unreasonable and thus violative of the due process of law guaranteed to the defendant by the U. S. Constitution.

2. Section 887, subdivision 7, does not on its face and it was not intended by the legislature to proscribe defendant's acts of wearing female attire in public. To so apply the statute is arbitrary and unreasonable and violates due process of law guaranteed by the Federal Constitution.

Since its original enactment, the language of subdivision 7 of Section 887 of the Code of Criminal Procedure has remained unaltered and unchanged. The legislature has not seen fit to amend or modify the language of this Section even in the face of a seemingly advantageous judicial ruling (*People* v. *Luechini,* Erie County Court 1912, 75 Misc. 614, 136 N.Y.S. 319). The defendant in a cited case was charged with having appeared in front of a movie theatre attired in female clothes and announced himself to be the "White Slave"—the name of the feature then being shown in the theatre—was quoted on appeal of having violated subdivision 7 of Section 887 of the Code of Criminal Procedure. In reversing the conviction, the Erie County Court cited that, in its opinion, its prerequisite to a conviction under any of the subdivisions of Section 887 to show the defendant "to be so situate or so conducting himself . . . that he is a menace to the health, safety or morals of the community . . ." the Court further held that "mere masquerading is not sufficient" and that it could not "conceive how a legislature, in the exercise of its police power,

intended to declare such an act malum prohibitum, i.e., criminal in itself, without proof of specific criminal intent'' (i.e. at 320).

It is clear from the legislative history of the statute that the then Governor of the State of New York intended to request legislation as being in aid of ''the officers of justice'' and was intended to reach a defendant ''who disguised his person for the purpose of committing crimes . . .''. In addition, in discussing the question of a violation of principle in making the use of the disguise itself an offense'', the Governor in determining for himself that no such violation of principle existed conditioned that determination on a higher finding by an examining magistrate'' that the purpose for which the disguise is assumed is unlawful and criminal''.

In the foregoing historical context, it seems clear that only upon a showing of the utilization by a defendant of the activities proscribed by subdivision 7 in aid of crime can there be a conviction under subdivision 7 alone. Stated otherwise, subdivision 7 was intended to be used in combination with other penal statutes and was never intended to be a proscription in and of itself.

3. The mere wearing of certain clothing or the adoption of a disguise does not constitute conduct inimical to the public welfare and cannot, constitutionally, be controlled by the state's police power.

This defendant's activity on March 24, 1964—walking the public streets in mid-afternoon, attired in female clothing—does not and cannot in and of itself constitute the commission of any crime or offense. A conviction under subdivision 7 of Section 887 of the Code of Criminal Procedure cannot lie because the statute by itself does not describe criminal conduct nor the likelihood of criminal conduct nor any other danger to the public welfare which could possibly be regulated by the police power of the State.

Clearly, the statute was not meant to apply as a control of deviant character—sexual or otherwise. Even if the statute did purport to make it a crime for man or woman to wear clothing designed for the opposite sex, the statute would be unconstitutional because the mere wearing of clothing to disguise one's sex is not in and of itself a danger to the safety, health and welfare of society.

Restrictions on the freedom and liberties of the individual are constitutional only if they are needed to protect the public health and secure the "public comfort and safety". "In re: Jacobs, 98 N. Y. 98, 110. If a statute bears no relation to the public safety and consequently is not a valid use of the police power . . . (1) is unconstitutional and void". *People* v. *Munoz*, 9 N. Y. 2d 51, 60-61. *People* v. *Ringe*, 197 N. Y. 143, 149. *People ex rel Tyroler* v. *Warden*, 157 N. Y. 116, 130, 133. *Murphy et al.* v. *Benson et al.*, 164 F. Supp. 120, 120 (E.D.N.Y. 1958).

4. It also contended that whether a surface reading of the statute is taken for its meaning or whether it is required to probe the legislative history, that the statute, itself, is too vague for proper application and leads to the injustice and snare which led to the arrest and conviction of the defendant. The terms of this statute are so vague, indefinite and uncertain that it must be deemed as repugnant to the due process clause of the 14th Amendment of the U. S. Constitution and the due process clause of Article I, Section 6 of the New York State Constitution. The standard of clarity required of statutes punishing for offenses and crimes must be higher than those depending primarily on civil sanctions for enforcement. The crime or offense proposed must be defined with sufficient definiteness so that the public may be aware as to public policy. The public should not be required to guess at the meaning of an enactment. *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Winters* v. *New York*, 333 U. S. 507, (1948).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

May 6, 1965

Respectfully submitted,

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APPENDIX A.

Decision of the Appellate Term of the Supreme Court of the State of New York, dated December 18, 1964.

At an Appellate Term of the Supreme Court, First Department held at the County Court House, Borough of Manhattan, City of New York, on the 17th day of December, 1964.

Present: Hon. Samuel M. Gold,
" Louis J. Capozzoli,
" Samuel H. Hofstadter,
Justices.

November No. 394

The People of the State of New York,

Respondent,

vs.

John Miller,

Defendant-Appellant.

An appeal having been taken to this Court by John Miller the defendant-appellant, from a judgment of conviction by Hon. Edward D. Caiazzo a Judge of the New York City Criminal Court, upon the charge of violation of § 887, subdivision 7 of the Code of Criminal Procedure, entered on the 31st day of March, 1964, and said defendant-appellant having been sentenced by Hon. Edward D. Caiazzo a Judge of said Court on the 31st day of March, 1964, as follows:

2 days in the Workhouse, execution of sentence suspended and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from be and the same is hereby affirmed.

ENTER

S. M. G.
Justice Appellate Term
Supreme Court, First Department

FILED
Dec 17, 1964
APPELLATE TERM

Certificate of the Court of Appeals Denying Leave to Appeal.

STATE OF NEW YORK

COURT OF APPEALS

Before: HON. STANLEY H. FULD, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOHN MILLER,

Defendant-Appellant.

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied on the authority of *People* v. *Gillespi* and *People* v. *Johnson* (15 N Y 2d 529). The defendant on this application urged the invalidity of section 887, subdivsion 7, of the Code of Criminal Procedure on the ground that it violates the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

Dated at New York, New York
February 16, 1965.

STANLEY H. FULD /S/
Associate Judge

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IN THE

Supreme Court of the United States

October Term, 1965

No. 145

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

JOHN MILLER,
Petitioner.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department, to review a judgment of that court rendered December 17, 1964, affirming a judgment of the Criminal Court of the State of New York, County of New York, of March 31, 1964, convicting petitioner of the offense of VAGRANCY [Code of Criminal

Procedure of the State of New York, §887(7)]. The sentence of two days in the Workhouse was suspended (16).* Leave to appeal to the New York Court of Appeals was denied by a judge of that court [FULD, J.] on February 16, 1965.

Questions Presented

1. Whether mootness commands the dismissal of the present petition.

2. Whether the New York Vagrancy statute [Code of Crim. Proc., §887(7)] prohibits a man from disguising himself as a woman and appearing in public with an intent to deceive.

3. Whether this statute is unconstitutionally vague and indefinite.

4. Whether this statute exceeds the constitutional bounds of the state's police power.

Statement of the Case

On March 24, 1963, at about 2:30 p.m., the arresting officer observed the defendant walking north on Manhattan's West End Avenue, between 91st and 92nd Streets, "dressed in female attire, a shirt, female [gray tinted] wig, high heels, a purse and a fur cape. He also had on his lips painted lipstick, and a powder base giving a rouge

* References, unless otherwise noted, are to the page numbers of the typewritten minutes of trial.

effect to his cheeks" (7-8). In sum, he appeared to be "a man dressed as a woman—an elderly woman" (9). When first questioned by the police officer, the defendant gave his name as "Joan Miller" (8).

Applicable Statute

The Code of Criminal Procedure of the State of New York

"§887 **Who are vagrants.** The following persons are vagrants:

* * *

7. A person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway".

Summary of Argument

The certiorari application must be dismissed as moot. This Court may not inquire if the courts below properly applied the statute in question. The meaning of that statute has been fixed for the purpose of this proceeding. That meaning is neither unclear nor uncertain, and represents a proper exercise of the enacting legislature's power.

POINT I

The application for certiorari should be dismissed.

The defendant, whose sentence has run without the attachment of prejudicial legal after-effects, is no longer able to obtain further judicial review. The issue being moot, he is precluded from the writ he now seeks. As this

Court held in *St. Pierre* v. *United States,* 319 U. S. 41, 42-3 (1943), in dismissing the certiorari petition:

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it (cits. om.). The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied."

This Court reaffirmed its position in *St. Pierre,* when it observed in *Parker* v. *Ellis, General Manager, Texas Prison System,* 362 U. S. 574, 575 (1959), "We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in Respondent's custody in at least three cases not relevantly different from the present one (cits. om.)."

Since the defendant's sentence was two days in the Workhouse, the execution of which was suspended, and that two days has long since run, he is no longer subject to any penalties. Moreover, as there are no "other disabilities or burdens" [*Fiswick et al.* v. *United States,* 329 U. S. 211, 222 (1946)] flowing from the judgment below, no exception exists to the present application of the mootness doctrine.

POINT II

The defendant is now precluded from arguing that the state statute [Code of Criminal Procedure §887(7)] does not apply to him.

In companion cases considered by the Court of Appeals of the State of New York, the applicability of the vagrancy statute to transvestitism was affirmed. See *People* v. *Gillespi* and *People* v. *Johnson,* 15 N. Y. 2d 529 (1964). While no opinion was written it is clear that the prosecution's theory in those cases, as in the one at bar, rested upon a showing of an intent to deceive. It is this interpretation which was urged in the trial court (16), and which, it is respectfully submitted, is binding on this Court. As was succinctly stated in *Winters* v. *New York,* 333 U. S. 507, 514 (1948), the state's interpretation "fixes the meaning of the statute for this case". Therefore, the defendant may no longer complain that his conduct was beyond the interdictions of the governing code. The state courts have ruled otherwise, thus formulating the law of the case.

POINT III

The statute is constitutional.

Defendant also contends that the statute in controversy is unconstitutionally "vague, indefinite and uncertain" (petition, p. 7). He is in error. In the *Winters* case (*Winters* v. *New York,* 333 U. S. at p. 515) this Court ruled that legislation is not unconstitutionally unclear so long as it sets up "ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." This language, which has since

become a navigational marker for legislative drafters, provides the applicable test, and section 887(7) meets it. Men of common intelligence can determine both the persons who fall within the scope of the prohibition and the exact behavior forbidden.

Interestingly, the legislative history of §887(7) reveals that at its inception the statute was designed to deal not with all disguises and devices but specifically with men wearing women's dresses. The forerunner of §887(7), Chapter 3 of the Laws of 1845, was passed originally to deal with certain insurrectionists, commonly known as "Indians," who were murdering writ-serving law enforcement officers (see Governor Wright's Message to the Legislature, New York Tribune, January 8, 1845). As part of their costume, these "Indians" wore women's calico dresses, which, of course, helped frustrate identification and apprehension.

Petitioner further contends that the statute as applied to transvestites is an unreasonable, arbitrary, unconstitutional exercise of the police power (petition, pp. 6-7). It is well-recognized that whenever a state's police power comes in conflict with freedom of expression, some balancing process must take place. Thus, "People can dress as they please, wear anything, so long as they do not offend public order and decency." *People* v. *O'Gorman,* 274 N. Y. 284, at 287 (1937). But transvestites do offend public order and decency.

The dress of the opposite sex is potentially the most effective of all disguises because it is the most subtle. So

basic is a person's sex to his identity, that in most cases law enforcement officers in search of a person initially narrow the scope of inquiry to "male or female?" Transvestites are therefore as effectively disguised as if they were masked.

Furthermore, separate and apart from the function the statute serves in the area of crime detection, transvestites, such as the defendant, directly offend and contradict the order of our contemporary culture. Much of our societal conduct is based on the ingrained assumption that those we encounter may be classified as either male or female, and we respond differently, making numerous decisions on the basis of sex. Almost all means of identification such as birth certificates and drivers' licenses indicate the sex of an individual. Selective Service cards must be carried as evidence of registration by males but not females. Indeed, it is fair to observe that personal and commercial relations are ordinarily established with considerations of sex pervading. By hiding in the guise of women, transvestites necessarily frustrate minimum standards of societal order. Camps, beaches, hospitals, hotels, restaurants and other places of public accommodation must, under law, provide separate facilities for each sex (see, for example, Public Health Law of the State of New York, State Sanitary Code, Chapter 6, Regulation 11; Chapter 7, Regulation 9; Sanitary Code of the City of New York, Regulations 1 and 2). Implicit in a useful administration of these laws and regulations is an assumption that men can be recognized as males and women as females.

Section 887(7) is an extension of the police power which must be upheld because of its relation to the health, safety, morals and welfare of the community. In these interests, the legislature has wisely enacted a statute which prohibits not all disguises or face coverings but only those which are intended specifically to prevent one from being identified. This minor restriction is neither arbitrary nor unreasonable in view of the confusion and chaos it prevents. See 59 Yale L. J. 1351, 1353 and nn. 7 and 8 (1950).

One final point. Even when society has a serious concern with the regulation of given conduct, that concern must on occasion yield to counterbalancing considerations. But that situation does not arise here, for there is no significant social value to be perceived in the defendant's activities. To prohibit men from dressing as women with an intent to deceive is to prohibit a pattern of behavior that is utterly without signification to a vital society.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June, 1965